



SPECIAL

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
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August 8, 1986

LEGISLATIVE REFERRAL MEMORANDUM

UNIT FILE	Chrono
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SPECIAL

TO: SEE ATTACHED DISTRIBUTION LIST

SUBJECT: Department of State testimony on S. 2263, a bill "to protect the public's right to receive and communicate information freely across the American border, and to ensure the right of international travel."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than 2:00 -- 8/8/86.

(NOTE -- A hearing on S. 2263 is schedule for 8/11/86.)

Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.

James C. Murr
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Assistant Director for
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Enclosure

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**TESTIMONY BY
MICHAEL H. NEWLIN
DEPUTY ASSISTANT SECRETARY OF STATE, BUREAU OF CONSULAR AFFAIRS
DEPARTMENT OF STATE
BEFORE THE SUBCOMMITTEE ON INTERNATIONAL
ECONOMIC POLICY, OCEANS, AND ENVIRONMENT
AUGUST 11, 1986**

Mr. Chairman and distinguished members of the Subcommittee. I am pleased to have this opportunity to testify today about Department of State practices and policies that affect the international flow of people and ideas, and to explain how those practices and policies further the national interest in significant ways while remaining true to the Constitution and our international obligations. In particular, I welcome this opportunity to offer the Department's views concerning S. 2263 -- the Chairman's pending bill "To protect the public's right to receive and communicate information freely across the American border, and to ensure the right of international travel."

Before offering specific comments on S. 2263, however, I believe it would be appropriate to make some general observations about the First Amendment concerns that trouble the proponents of S. 2263 and similar proposed legislation like S. 2177 and H.R. 2361.

Freedom of expression is a fundamental freedom enshrined in the First Amendment. I wholeheartedly concur in the distinguished Chairman's statement of March 27 upon submission

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of S. 2263 that "A free flow of information and ideas among American citizens is the foundation of our democratic society." However, the fundamental right of free expression must sometimes be balanced against important competing national interests.

Much of the support for initiatives like S. 2263 is based upon the false notion that this administration is engaged in an ideological campaign to use existing visa and others laws to stifle the right of American citizens to receive information. For example, columnist Anthony Lewis recently asserted, in an editorial titled "Fear of Freedom," that "the fear of dangerous ideologies [has] intensified ... under the Reagan Administration." Such assertions are totally without foundation and could not be further from the truth.

By virtue of my position, I have intimate, first-hand knowledge concerning both the officials who make such decisions and the methods by which such decisions are made. I can assure you that I have never seen or heard of an alien having been barred from this country solely, or even principally, because a government official disagrees with the alien's abstract political opinions. In fact, determinations to deny aliens visas under section 212(a)(27), (28) and (29) of the Immigration and Nationality Act are made most thoughtfully, with the conviction that the Department is complying fully with the intent of Congress.

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As I make clear in my further comments, both the Secretary of State and the Attorney General have made it absolutely clear that it is not the policy of this Administration to deny visas to aliens merely because of their abstract political ideology, or because the Administration wishes to deny Americans access to ideas with which it disagrees. In this connection, the Department of State would not oppose, in principle, changes to section 212(a)(28) of the INA that might ameliorate concerns about possible infringements on the First Amendment rights of Americans, provided that such changes would preserve the Executive's existing authority to exclude certain aliens in order to protect important national interests. We would, of course, wish to review any such proposal with great care.

Since the Chairman's invitation letter of July 30 also adverts to possible conflicts between existing United States immigration laws and the obligations of the United States under the Helsinki Final Act, I would like to ask that the Committee accept for the record my February 6, 1986 statement on this subject before the Congress' Commission on Security and Cooperation in Europe, as well as the Department's supplemental answers that were submitted subsequent to the February 6 hearing. In summary, the Department is strongly of the view that United States immigration laws do not in any way conflict with our Helsinki obligations.

With the Committee's permission, I will now offer specific comments on those sections of S. 2263 that are of particular concern to the Department of State.

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First, the Department of State would strongly oppose section 2(a)(1) of the bill, which would amend 8 U.S.C. 1182(a)(27), if the change is intended to preclude visa denials for foreign policy reasons. For many years, the Departments of State and Justice have interpreted section (27) to apply not only to "internal security" cases, but also to cases in which an alien's entry, presence or proposed activities in the United States could have potentially serious adverse foreign policy consequences. It has been the Executive's longstanding interpretation of section (27) that, in the latter class of cases, the alien's entry, presence or activities could properly be said to be "prejudicial to the public interest." With respect to concerns about freedom of expression, it is important to understand that section (27) is invoked only rarely for foreign policy reasons -- about 15 times during each of the past several years -- and then only after personal consideration and decision by the Secretary or one of his immediate deputies. Section (27) is never employed lightly or to exclude aliens solely or principally because of their abstract political views. In my experience, every country reserves to itself the ability to exclude aliens in such cases, and the Department believes it would be both ill-advised and contrary to the national interest if the Congress were to deny such power to the Executive. I should add that the Executive's interpretation and application of section (27) is currently under review in several pending court cases.

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Second, the Department opposes section 2(a)(2) of the bill, which would eliminate 8 U.S.C. 1182(a)(28) in its entirety. Section (28) is the so-called "ideological exclusion" provision of the Immigration and Nationality Act of 1952 -- the McCarran-Walter Act. Because certain subsections of section (28) exclude aliens merely because of their personal political views or associations, and because of its identification with the "Red scares" of the 1950s, section (28) has been the target of strong and sustained attack by civil libertarians as being undemocratic. In the late 1970s, however, Congress devoted careful attention to section (28) on two separate occasions and substantially modified its effect with the specific, stated purpose of "achieving greater United States compliance with the provisions of the [Helsinki Final Act]." This was the so-called [1978] McGovern Amendment, 22 U.S.C. 2691, as subsequently modified in amendments sponsored by Congressman Solarz and Senator Baker.

In practice, however, the effect of the McGovern Amendment was principally cosmetic, since the Secretary of State had already been recommending waivers of ineligibility in most cases covered by the Amendment for many years. Also, the McGovern Amendment -- unlike S. 2263 -- applies only to nonimmigrant aliens and only to those aliens who are excludable under section (28) solely because of "membership in or affiliation with a proscribed organization." (In practice, the

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Department doesn't refuse visas based upon an alien's personal, abstract beliefs, although it would be theoretically possible to do so in certain cases.) Moreover, Congress expressly excluded from the coverage of the McGovern Amendment "representatives of purported labor organizations in countries where such organizations are in fact instruments of a totalitarian state"; aliens who are "member[s], officer[s], official[s], representative[s], or spokesm[en] of the Palestine Liberation Organization"; and, aliens from countries which the Secretary of State determines "are not in substantial compliance with the provisions of the Helsinki Final Act, particularly the human rights and humanitarian affairs provisions."

Although the McGovern Amendment has undoubtedly restricted the Secretary's ability to encourage travel reciprocity with Communist countries, it has certainly reduced, if not totally eradicated, the ideological force of section (28). Thus, as the law stands today, the only alien nonimmigrants who are excluded under section (28) solely because of their abstract political beliefs or associations are those affiliated with the PLO and certain representatives of communist labor organizations. From the Department of State's point of view, therefore, S. 2263's proposed elimination of section (28) is unnecessary.

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Apart from the objection that elimination of section (28) is unnecessary, and putting aside the fact that the section's elimination would cover intending immigrants as well as nonimmigrants, the Department's principal objection to this proposal is that it would deny the United States its existing ability to exclude under section (28)(F) aliens who we know or have reason to believe have been personally involved in terrorism. In this connection, it is imperative to distinguish current section (28)(F) on the one hand and current sections (27) and (29) on the other.

Current sections (27) and (29) direct themselves exclusively to circumstances which the Executive believes would occur only after the entry of the alien into the United States. Activities in which an alien may have engaged in the past have no bearing under either section -- except, of course, to the extent that the alien's past conduct may provide some indicia about his possible future behavior. Section 28(F), on the other hand, directs itself to an alien's past associations with terrorist organizations or past involvement in terrorist activities, without regard to the purpose of the alien's currently proposed travel to the United States. While, as an abstract matter, some may believe that it is inappropriate to hold an alien's past activities and associations against him if his currently proposed purpose of travel is legitimate, the Department believes it is unwise, undesirable and inappropriate to ignore past terrorist conduct in determining an alien's admissibility under the immigration laws.

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For example, as the Department reads S. 2263 it would eradicate the Executive's existing authority to bar an otherwise admissible alien from the United States solely on the ground that the alien is a member of, or affiliated with, terrorist organizations or has actively participated in terrorist acts abroad over which the U.S. may not have jurisdiction. The Department believes it would be wrong to remove from the law -- as we read S. 2263 to do -- authority to deny admission to otherwise admissible aliens like those, for example, whom we know or have reason to believe may have participated in the murders of Leon Klinghoffer, Lord Louis Mountbatten or Swedish Prime Minister Olaf Palme.

Before leaving section (28), I should note that the Department is cognizant of criticisms that have been lodged against alleged "humiliating" and "chilling" delays that sometimes occur in the waiver process. In this connection, I am pleased to report that the Department of State and the Immigration and Naturalization Service entered into an interagency agreement on March 22 that should substantially reduce the current waiting time in the vast majority of routine (28) "membership or affiliation" cases by delegating to the Department INS's waiver authority in routine cases. This agreement should be implemented in the near future.

Finally, I wish to emphasize that the Department would have no objection in principle to modifications of current subsections 28(A) through (E) and (G) through (I) in

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nonimmigrant cases, provided that any such changes would clearly preserve existing Executive Branch authority to exclude aliens on purely ideological grounds for important reasons of state, e.g., our current exclusion of communist labor representatives and PLO affiliates. Of course, we would wish to review any legislative proposals in this area with care.

Third, the Department opposes section 2(d) of S. 2263, not only because it appears unnecessary, but also because the change could be construed as intending to divest the President of his current authority under 8 U.S.C. 1182(f) to prohibit, or impose restrictions upon, the entry into the United States of all aliens in time of crises.

Fourth, the Department opposes section 2(e) of S. 2263, which would add three new subsections to 8 U.S.C. 1182. Proposed new section (m)(1) would prohibit the denial of a visa to, or the exclusion from the United States of, an alien on the basis of any past or expected speech, belief, activity, affiliation, or membership which, if conducted or held within the United States by a United States citizen, would be protected by the First Amendment. This proposed new subsection would also prohibit the denial of a visa to, or the exclusion from the United States of, an alien because of the expected consequences of any activity the alien might engage in, if engaging in such activity in the United States by a United States citizen would be constitutionally protected.

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Proposed new subsection (m)(2) would prohibit, on the same basis, the placing of restrictions on an alien to whom a visa had been issued. If adopted, such a provision would, for example, deny the Executive its current ability to restrict PLO U.N. Observer Mission personnel to the confines of the Headquarters District.

Proposed new subsection (m)(3) would authorize any person in the United States -- citizen or not -- who intends to communicate with an alien in any fashion to bring a civil action in federal court against any government official, including presumably the President, who allegedly violates the prohibitions contained in proposed subsections (m)(1) and/or (m)(2).

Both the Secretary of State and the Attorney General have recently expressed in public fora -- the Secretary in his January 12 PEN address; the Attorney General in a February 25 address at the National Press Club -- their strong personal opposition to the denial of nonimmigrant visas to aliens because of their abstract political beliefs or affiliations. The Secretary has also made clear that the United States does not deny visas to aliens because we happen to disagree with their political views or because they propose to express those views in the United States. Thus, the Department is in sympathy with the general intent and purpose of proposed subsections (m)(1) and (2). On the other hand, we have strong

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reservations about any provisions that would treat aliens as if they were U.S. citizens and believe that such provisions would be extremely difficult to administer. For example, would such provisions require that we issue visas to aliens like Pol Pot, Idi Amin, Mu'Ammar Qadhafi, Ayatollah Khomeini, IRA fund raisers, PLO activists and others whose presence the Executive or the Congress might find inimical to fundamental United States interests, notwithstanding that such aliens were coming for the lawful purpose of making a public speaking tour? Who would make the decision about whether the alien's past or intended speech, etc., would meet constitutional muster?

Of special concern to the Department are the potential adverse consequences of proposed section (m)(3), which would grant standing to any person in the United States -- alien or citizen -- who claims that an alien's visa application has been denied in violation of the prohibitions of proposed section (m)(2), and that he intended to communicate with the alien on any subject, public or private, in any manner, to bring a civil action in federal court against any official who participated in the visa denial.

Section (m)(3) would apply without regard to the basis upon which the alien's visa application had been denied. For example, an alien applying for a nonimmigrant visa to visit his relatives in the United States might be refused a visa on the

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ground that he had failed to establish an intent to return to a foreign residence after the allegedly temporary visit (8 U.S.C. § 1184(b)) or that the alien participated in Nazi persecutions (8 U.S.C. 1182(a)(33)). If that alien's relatives were to assert, however frivolously, that the alien's application had been denied in violation of proposed section (m)(1), they would have standing to bring a civil action in federal court against, inter alia, the consular officer who denied the visa. The prospects for such harrassing litigation would, the Department believes, have a severe chilling effect upon the aggressive application of our visa laws by United States consular officers.

Perhaps more significant, proposed section (m) could -- and, in the Department's judgment would -- also form a springboard for judicial review of visa denials generally, a development which the Department would strongly oppose. In April, 1950, the special subcommittee of the Senate Judiciary Committee that conducted the study which resulted in the Immigration and Nationality Act of 1952 concluded:

... to allow an appeal from a consul's denial of a visa would be to make a judicial determination of a right when, in fact, a right does not exist. An alien has no right to come to the United States and the refusal of a visa is not an invasion of his rights. Permitting review of visa decisions would permit an alien to get his case into United States courts, causing a great deal of difficulty in the administration of the immigration laws. [S. Rep. No. 1515, 1st Sess. 622 (April 20, 1950)]

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The Department believes that the subcommittee's conclusions remain valid today, and strongly opposes any legislative initiative that might open the courthouse doors to the more than 500,000 aliens who are denied visas each year -- with all of the expense and additional burden on the federal judiciary that such an eventuality would entail.

Fifth, the Department opposes as unnecessary section 4 of S. 2263, which would amend the Passport Act, 22 U.S.C. 211a, to forbid the Secretary of State from denying, revoking or restricting a passport based on any speech, activity, belief, affiliation or membership of the citizen applicant that is protected by the First Amendment.

The constitutionality of the Secretary's passport authority as it relates to freedom of expression has been carefully and completely explored by the Supreme Court. Thus, in the 1958 case of Kent v. Dulles, 357 U.S. 116, the Court found that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." In 1964, in Aptheker v. Secretary, 378 U.S. 500, the Court emphasized that freedom of travel "is a constitutional liberty closely related to rights of free speech and association." The Court most recently revisited this issue in its 1984 decision in Haig v. Agee, 453 U.S. 280,

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in which the Court rejected a challenge to the Secretary's regulations which permit passport restrictions under certain limited conditions, none of which pertains to the citizen's speech, beliefs or associations. Today, the only country to which passport restrictions apply is Libya, and even in the case of that country, exceptions are granted for the media and for humanitarian reasons. In short, I believe that proposed section 4 would only muddy the waters in an area that the Supreme Court has worked so hard to clarify.

Sixth, the Department strongly opposes sections 6 and 7 of S. 2263, which would amend section 203(b) of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1702(b), and section 5 of the Trading with the Enemy Act (TWEA), 50 U.S.C. App. 5(b)(1), by eliminating those provisions that currently permit the Executive to prohibit Americans from engaging in financial transactions incident to (i) travel to, in, or through specified countries in time of emergency, or (ii) the importation of informational materials from such countries.

The Department opposes these sections because of the seriously adverse effect such changes would have on our ability to pursue vital U.S. interests. Specifically, the proposals would deny the President the authority during times of war and national emergency to prevent the flow of

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U.S. currency and other benefits to states with policies inimical to the United States. Adoption of these sections would seriously degrade the President's ability to deprive these states of the financial means to undertake actions hostile to the United States and other friendly countries.

The proposed sections would also appear to apply to existing embargoes and would, therefore, seriously undermine our current policies, particularly with respect to Cuba and Libya. Both Cuba and Libya would earn substantial hard currency if travel related transactions were no longer restricted -- hard currency which would be used by Cuba to finance the subversion of democracy in Latin American and the Caribbean and by Libya to carry out its terrorist activities. Denying this hard currency is central to U.S. policy towards these countries.

The Department recognizes and shares Congress' concerns that restrictions on the transactions in question be imposed only where necessary. We note that the Administration has, where consistent with U.S. interests, modified existing embargoes to allow such transactions. For instance, transactions relating to travel to North Korea, Vietnam, and Kampuchea are authorized pursuant to general license, as are transactions relating to travel to Cuba for, inter alia, family visits and news gathering purposes. Fully hosted travel to Cuba is also permitted.

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A general license has also been issued for humanitarian reasons authorizing transactions related to travel to and within Libya by immediate family members of Libyan nationals. Furthermore, imports of informational material for educational or newsgathering purposes from these countries are authorized by general license, and specific licenses are issued, subject to certain conditions, for commercial import of such materials.

Seventh, the Department opposes section 9 of S. 2263, which would amend section 38(a) of the Arms Export Control Act, 22 U.S.C. § 2778(a), to require that decisions on issuing certain export licenses take into account "the policy of the United States to sustain vigorous scientific enterprise and to respect the ability of scientists and other scholars freely to communicate their research and findings by means of publication, teaching, conferences, and other forms of scholarly exchange."

In the Department's view, section 9 is unnecessary, since current law already provides more than adequate protection to scholars. Only communications which are "directly related" to an item on the munitions list are governed by the International Traffic in Arms Regulations (ITAR). Thus, other communications -- including the export of information containing general scientific, mathematical or engineering principles as well as material in the public domain -- are not regulated by the ITAR. The Department's administration of the ITAR with respect to the export of technical data "directly related" to an

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item on the munitions list is fully consistent with relevant court decisions relating to First Amendment protection of free expression.

Moreover, the proposed section contains terms which are vague, and thus potentially inconsistent with United States policy prohibiting the export of technical data on the munitions list to the Soviet bloc and other countries with respect to which the United States maintains an arms embargo. For example, to the extent that application of the term "take into account" would tend to compel the Department to issue licenses to scholars, the proposed provision would be inconsistent with the Department's responsibilities. The terms "vigorous scientific enterprise" and "scholarly exchange" are similarly vague and could conflict with established United States policy regarding such matters.

Finally, before concluding I wish to point out that the Department's numerous objections to S. 2263 are neither ill-considered or transitory. Indeed, many of our objections represent the product of more than three years of intensive discussions and negotiations with interested sections of the American Bar Association (i.e., the section of Individual Rights and Responsibilities; the section on Law and National Security; and, the section on International Law) concerning issues addressed in the proposed bill.

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In the face of strong opposition from the ABA sections on International Law and Law and National Security, the section of Individual Rights and Responsibilities withdrew a proposed resolution that covered many of the visa and travel-related matters proposed in S. 2263 and presented instead a resolution that called only for limited liberalization of 8 U.S.C. 1182(a)(28). That resolution was adopted by the ABA House of Delegates at its February 1986 meeting, without federal government opposition. As I mentioned earlier in my testimony, the Department of State would not oppose reasonable changes to section (28), provided that such changes would not weaken the ability of the United States to combat international terrorism or to protect other important United States interests.